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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RALPH P. EAGERTON, JR., as COMMISSIONER OF REVENUE, of the STATE OF ALABAMA, et al,

Petitioner

versus

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether **Code of Alabama 1975**, section 40-17-150 violates the Commerce Clause of the **United States Constitution**?

2. Whether the Alabama Court of Civil Appeals correctly interpreted the previous decision of the United States Supreme Court in the case of ***American Trucking Associations, Inc. v. Scheiner***, 483 U.S. 266, decided June 23, 1987, when the Alabama Court of Civil Appeals held **Code of Alabama 1975**, section 40-17-150, to be in violation of the Commerce Clause of the ***United States Constitution***?

LIST OF PARTIES TO PROCEEDINGS BELOW

PLAINTIFFS-APPELLEES Below:

Owner-Operator Independent Drivers Association, Inc., Shirley A. Wendt d/b/a Shirley's Express, Douglas and Sons, Inc. and B.B. Express, Inc., on behalf of themselves and as class representatives of all others similarly situated.

DEFENDANTS-APPELLANTS Below:

James M. Sizemore, Jr., Commissioner of Revenue of the State of Alabama, now succeeded by Ralph P. Eagerton, Jr., Honorable Guy Hunt, Governor of Alabama, now succeeded by the Honorable Forest Hood James, Governor of Alabama, James H. Evans, Attorney General State of Alabama, now succeeded by Jeff Sessions, Attorney General of Alabama, and Commissioners James Sullivan, Charles Martin and Janice Cook of the Alabama Public Service Commission.

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OPINIONS BELOW

The opinion of the Alabama Court of Civil Appeals, and the certificate of judgment of the Supreme Court of Alabama, which are hereby sought to be reviewed, were entered on January 13, 1995, and November 9, 1995, respectively.

The opinion of the Alabama Court of Civil Appeals does not yet appear in the Official Reports for the Court of Civil Appeals. However, the opinion of the Alabama Court of Civil Appeals, ___So.2d___, may be found at Lexis 103, and was assigned docket number AV93000613 by the Court of Civil Appeals. The opinion of the Alabama Court of Civil Appeals is included herein as Appendix "B."

The certificate of judgment of the Supreme Court of Alabama also does not yet appear in the Official Reports for the Supreme Court of Alabama. However, the certificate of judgment of the Supreme Court of Alabama was assigned docket number 1940796 by the Supreme Court of Alabama, and is included herein as Appendix A.

JURISDICTIONAL BASIS

The certificate of judgment of the Supreme Court of Alabama, denying the Commissioner of Revenue's Petition for Writ of Certiorari, was entered on November 9, 1995. The Supreme Court of Alabama is the highest court of the State of Alabama in which a decision can be had. The decision of the Supreme Court of Alabama failed to review and otherwise reverse or overturn a decision of the Alabama Court of Civil Appeals which held that **Code of Alabama 1975**, section 40-17-150, which imposes a fee of twelve dollars ($12.00) for the issuance of an identification marker for every motor

vehicle of a Motor Carrier operated on the highways of Alabama, was in violation of the Commerce Clause of the **United States Constitution**. This petition for writ of certiorari is filed within 90 days from the aforesaid date. The jurisdiction of this Honorable Court is conferred and invoked pursuant to Title 28, **United States Code**, section 1257, which governs the review of final judgments or decrees rendered by the highest court of a State.

CONSTITUTIONAL PROVISION AND STATUTES

This petition involves the Commerce Clause of the **United States Constitution**, Article I, section 8, clause 3, which provides that "Congress shall have the power... to regulate commerce... among the several states,...;" as it applies to the Alabama statute codified as **Code of Alabama 1975**, section 40-17-150, which imposes a twelve dollar ($12) fee for the issuance of an identification marker to be displayed on every motor vehicle of a motor carrier operating such vehicles on the highways of Alabama. The verbatim text of the Alabama statute is deemed too lengthy to recite at this point, however the complete text of the Alabama statute is set forth in the appendix as Appendix G.

STATEMENT OF THE FACTS

This case was originally submitted to the Trial Court on cross-motions for summary judgment. The material facts are not in dispute, and are uncontroverted. For the purposes of this petition, the recitation of the facts contained in the opinion of the Alabama Court of Civil Appeals must be considered as true and sufficient.

> "Ala. Code 1975, §40-17-150, provides for an annual identification marker fee

of $12.00 for certain motor vehicles, including motor vehicles with a capacity of more than nine passengers and vehicles with more than two axles. Ala. Code 1975, §40-17-140. A tax on motor carrier fuel used in Alabama is imposed by Ala. Code 1975, §40-17-141. The proceeds from the marker tax are deposited into the public road and bridge fund. Ala. Code 1975, §40-17-150(f). Other provisions of the statute address the collection, reporting, and crediting of the tax."

"The Association presented as evidence an affidavit of Robert N. Fenili, who had performed statistical studies and had determined that the cost of the marker fee tax was six times greater for non-Alabama-based carriers than for Alabama-based carriers; thus, he said, the effect of the statute is to discriminate against interstate commerce." (Opinion of the Alabama Court of Civil Appeals *sub judice*, pp. 3 and 5.)

The above factual statements constitute the totality of the finding of facts contained in the opinion of the Alabama Court of Civil Appeals.

STATEMENT OF THE CASE

This petition for writ of Certiorari is from a Certificate of Judgment of the Supreme Court of Alabama, denying the Commissioner of Revenue's petition for Writ of Certiorari for a review of an opinion issued by the Alabama Court of Civil

Appeals, holding that the Alabama Motor Fuel Identification Marker Fee levied pursuant to **Code of Ala. 1975**, §40-17-150, is unconstitutional because it violates the Commerce Clause of the United States Constitution. On June 28, 1991, the Plaintiffs/Appellees' below (hereinafter "the Association and Truckers"), filed a Complaint with the Circuit Court of Montgomery County, Alabama, seeking a declaratory judgment as to the constitutionality of **Code of Ala. 1975**, §40-17-150, and requesting that the action be certified as a class action. The Association and Truckers also asked that all fees paid pursuant to §40-17-150 be treated as "being made under protest" and that the Commissioner of Revenue be ordered to have such fees "escrowed" until there was a final disposition of the case.

The Trial Court not only found that the statute was unconstitutional, but also ruled, over the objections of the Commissioner of Revenue, that the action should be treated as a class action, and that the Association and Truckers, as representatives of the class, were entitled to a refund of all taxes paid in escrow during the pendency of the lawsuit.

On July 19, 1993, the Association Truckers filed a "Motion for Partial Summary Judgment on the Issue of Liability", along with affidavits and a Memorandum Brief in support of their Motion for Summary Judgment. On October 5, 1993, the Commissioner of Revenue filed a Cross-Motion for Summary Judgment, as well as a Memorandum Brief in Support of the Commissioner's Cross-Motion for Summary Judgment. On October 12, 1993, the Association and Truckers filed a Motion in Opposition to the Commissioner's Cross-Motion for Summary Judgment.

On November 1, 1993, the Trial Court entered an Order granting the Association and Truckers' Motion for Partial Summary Judgment on the Issue of Liability. On December 22, 1993, the Association and Truckers filed a Motion for Partial Summary Judgment on the Issue of Remedy, as well as a Brief in Support of their Motion.

On January 12, 1994, the Trial Court entered an **Interim Final Judgment**. (Setforth herein at the Conclusion as Appendix E.) On January 26, 1994, the Association and Truckers filed a Motion for Rule 54(d), pursuant to the **Alabama Rules of Civil Procedure (ARCP)**, requesting the Trial Court to certify as a "Final Judgment" its Order of November 1, 1993, on the issue of liability, and its **Interim Final Judgment** entered January 12, 1994, on the issue of remedy. On February 7, 1994, the Trial Court entered an **Order and Final Judgment** as to the issue of liability and remedy. (The Trial Court's Order and Final Judgment is setforth herein at the conclusion as Appendix F.) It was from this **Order and Final Judgment** that the Commissioner of Revenue filed a Notice of Appeal with the Circuit Clerk of Montgomery County, Alabama, to the Alabama Court of Civil Appeals.

On January 13, 1995, the Alabama Court of Civil Appeals affirmed the decision of the Trial Court holding that **Code of Ala. 1975**, §40-17-150, is unconstitutional and thereby void. The decision of the Alabama Court of Civil Appeals also affirmed the order of the Trial Court permanently enjoining the collection of the fee levied pursuant to §40-17-150, and ordering a refund of previously collected fees, with interest. Finally, the Court of Civil Appeals affirmed the Trial Court's order awarding attorney fees and costs against the State of Alabama.

On January 27, 1995, the Commissioner of Revenue pursuant to Rule 40, **Alabama Rules of Appellate Procedure (ARAP)**, timely filed an Application for Rehearing, with the Clerk of the Alabama Court of Civil Appeals. Along with the Application for Rehearing, the Commissioner filed a motion pursuant to Rule 39, ARAP, requesting the Alabama Court of Civil appeals to correct a certain finding of fact contained in the Opinion of the Alabama Court of Civil Appeals. On February 17, 1995, the Alabama Court of Civil Appeals overruled the Commissioner of Revenue's Application for Rehearing. No opinion was written on rehearing.

On March 3, 1995, the Commissioner of Revenue filed with the Clerk of the Supreme Court of Alabama a Petition for Writ of Certiorari, along with exhibits and a brief in support thereof. On March 15, 1995, the Association and Truckers filed a Brief in Opposition to the Commissioner of Revenue's Petition for Writ of Certiorari. On November 9, 1995, the Supreme Court of Alabama issued its Certificate of Judgment, denying the Commissioner of Revenue's Petition for Writ of Certiorari (Setforth herein as Appendix A.)

The questions and grounds presented for review in this petition were presented to the Trial Court not only in the pleadings, but also in the Motion for Summary Judgment and Cross-Motion for Summary Judgment submitted prior to its decision, and were stated in the Trial Court's opinion. The questions presented for review in this petition were renewed in briefs filed with the Alabama Court of Civil Appeals, and were stated and addressed in the Opinion of the Court of Civil Appeals. Each of the questions presented for review in this petition were also presented to the Supreme Court of Alabama for consideration prior to its decision to deny the

Commissioner's petition for Writ of Certiorari.

The opinion of the Court of Civil Appeals which is sought to be reviewed by this petition, held that the challenged Alabama statute was unconstitutional under the Commerce Clause of the **United States Constitution**.

ARGUMENT

The issues presented in this petition are substantial and intertwined. In essence, the Alabama Court of Civil Appeals through its opinion, and the Supreme Court of Alabama, through its refusal to overturn the opinion, have ruled that an Alabama statute which charges a twelve dollar fee for the issuance of a motor fuel identification marker decal is unconstitutional because it violates the Commerce Clause of the **United States Constitution**. In support of its decision to find the Alabama statute unconstitutional, the Alabama Court of Civil Appeals concluded that such an interpretation was required, due to holding of the United States Supreme Court in the cases of ***American Trucking Associations, Inc. v. Scheiner***, 493 U.S. 266, (decided June 23, 1987), and ***Complete Auto Transit, Inc. v. Brady***, 430 U.S. 274 (decided March 7, 1977). If the Alabama Court of Civil Appeals has misapplied the holdings of this Honorable Court to the undisputed facts of this case, then the Alabama statute is not in violation of the Commerce Clause, and the opinion of the Alabama Court of Civil Appeals, as well as the failure of the Supreme Court of Alabama to overturn such opinion, is due to be reversed and otherwise set aside.

BACKGROUND

Code of Ala. 1975, §40-17-140, et seq., establishes a system that is intended to insure that those persons who use the highways of Alabama for commercial purposes will fully and properly pay all motor fuel excise taxes on fuel consumed on Alabama highways. The statutory scheme requires that motor carriers (as that term is defined in the statute), pay such excise taxes as compensation for the privilege of operating their vehicles on Alabama highways. Under the Alabama Motor Carrier Fuel Tax Law, a motor carrier operating a vehicle on an Alabama highway can obtain a credit from the payment of the Alabama tax for an amount equivalent to the per gallon rate for each gallon the motor carrier can document was purchased in Alabama. A credit can also be obtained by a motor carrier who can document that it has paid to another state a tax similar to Alabama's Motor Fuel Excise Tax, for motor fuel purchased in Alabama, but consumed in another state. **(Code of Ala. 1975**, §40-17-142.)

Thus the scheme of taxation developed by the Alabama Legislature is that each motor carrier using the highways of Alabama in its commercial operations should pay an excise tax for the privilege of such use. The tax is equivalent to the amount of Alabama Excise Tax imposed on motor fuel consumed by the motor carrier in its operation on the highways of Alabama, less any taxes the motor carrier can document it has previously paid on such fuel purchased in Alabama.

The Motor Carrier Fuel Tax is deemed equivalent to the rate per gallon of the applicable Alabama tax on that motor fuel which is consumed in the motor carrier's operations. The motor carrier is entitled to a credit for each gallon of tax-paid motor fuel it can document it purchased in Alabama. If the

motor fuel consumed by the motor carrier on Alabama highways is purchased outside Alabama, then the motor carrier is required to pay a tax equivalent to the rate per gallon of the applicable motor fuel it would have paid had the fuel been purchased in Alabama. It is important to understand that the Taxpayers in the present proceeding have never contested or attacked this method of taxation!

MOTOR CARRIER FUEL TAX IDENTIFICATION MARKER

In order to identify which motor carriers are liable for the payment of the Motor Carrier Fuel Tax, the Alabama Legislature established the Identification Marker System. Specifically, **Code of Ala. 1975**, §40-17-150, requires that all vehicles of any motor carrier operating on the highways of Alabama have identification decals displayed, and that each motor carrier must pay a fee of $12.00 for the issuance of such identification marker.

It has long been settled that if a motor vehicle is used for commercial purposes on the highways of Alabama, then such person operating said vehicle can be required to pay a fee for exercising the privilege of using the highways of Alabama for purposes of pecuniary gain. **National Motor Fleet, Inc. v. Brown**, 282 Ala. 572, 313 So.2d 570 (1968).

The purpose of the identification marker is to identify those motor carriers who have registered with the Alabama Department of Revenue under the provisions of the Alabama Motor Carrier Fuel Tax Law. If a vehicle operating on the highways of Alabama, and appearing to be engaged in the business of a motor carrier, does not display the proper identification marker, then pursuant to the provisions of the Motor Carrier Fuel Tax Law, the operator of the vehicle would

be subject to being stopped by a law enforcement officer and asked to provide proof of registration with the Department of Revenue. Thus, the marker allows a motor carrier to operate on the highways without being subject to being stopped and required to produce proof of registration for payment of motor fuel tax. Thus, at least one of the purposes of the motor fuel identification marker system is to allow motor carriers engaged in interstate commerce to operate on the highways of Alabama with a minimum of interference from law enforcement officers.

Section 40-17-140(2), defines the term "motor carrier" for purposes of the Alabama Motor Carrier Fuel Tax Law as:

> "MOTOR CARRIER. Every person, firm, or corporation who or which operates or causes to be operated on any highway in this state any motor vehicle, as defined herein, except any resident person, firm, or corporation, owning or operating not more than one such motor vehicle for his own use and not, for hire, and except any person, firm, or corporation the motor vehicles of which are operated or caused to be operated wholly within this state."

It is true that Alabama motor carriers whose vehicles never leave Alabama, and who are engaged solely in intrastate commerce, are not required to obtain identification decals. However, the Commissioner submits that this scheme of taxation is entirely logical and can be upheld on two grounds. First, it would be nonsense to require an Alabama carrier engaged solely in intrastate commerce, i.e., a motor carrier whose vehicles never leave Alabama, to register under the Motor Carrier Fuel Tax Law

because, since the vehicles never leave Alabama, the likelihood of motor fuel being purchased for the vehicle outside Alabama would be practically nonexistent. Surely, the logic of this scheme of taxation is readily apparent in that it would not only be nonsense, but unduly burdensome, to require an Alabama motor carrier whose vehicles never leave Alabama to register with the Department of Revenue and continually file quarterly reports which would state in essence: (1) it had purchased all of its motor fuel in Alabama which it had consumed in Alabama; and (2) it had purchased no motor fuel outside Alabama which it had used in its operations on Alabama highways, therefore no tax was due the State of Alabama.

Secondly, motor carriers who are engaged solely in intrastate commerce are regulated by the Alabama Public Service Commission (APSC), and according to APSC statutes and regulations, such motor carriers are required to display their public service identification number on their trucks or truck-tractors in a fashion similar to displaying the motor fuel identification marker. Thus, a law enforcement officer observing a trucker or truck-tractor belonging to an Alabama motor carrier engaged solely in intrastate commerce, would immediately be able to recognize and distinguish that the vehicle was subject to Alabama Public Service Commission regulation and would not be liable to display an Alabama Motor Carrier Fuel Tax Identification Marker.

I.

WHETHER CODE OF ALA. 1975, §40-17-150, VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION?

The Alabama Court of Civil Appeals determined that the Alabama statute, which requires motor carriers operating their motor vehicles on the highways of Alabama in interstate commerce to display an identification marker evidencing registration for payment of the Alabama Motor Carrier Fuel Tax is unconstitutional as being in violation of the Commerce Clause of the **United States Constitution.** The rationale of the Court of Civil Appeals is quite succinct. The entire holding of the Court of Civil Appeals on the constitutionality of the statute is found in two sentences within its eight-page opinion:

> A state tax can withstand a Commerce Clause challenge if:
>
> > the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.
>
> Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). The Supreme Court has ruled that a flat-rate Pennsylvania Marker Fee Tax, similar to Alabama's violated the Commerce Clause. American Trucking Association, Inc. v. Scheiner, 483 U.S. 266 (1987).

(Page 4, Opinion of the Court of Civil Appeals, attached hereto as Appendix B.)

From a reading of the above-quoted language included in the Opinion of the Alabama Court of Civil Appeals, it is clear that the only reasons the Court of Civil Appeals gave for concluding that the Alabama statute was unconstitutional was because it concluded

that the Alabama statute somehow violated the test enunciated in the ***Complete Auto Transit*** case, and because:

> The Supreme Court has ruled that a flat-rate Pennsylvania Marker Fee Tax, similar to Alabama's violated the Commerce Clause.

According to the four-prong test established in the ***Complete Auto*** case, the Commissioner of Revenue submits the Alabama statute passes constitutional muster. While the Alabama Court of Civil Appeals did not specifically state with particularity how it concluded the Alabama statute failed the ***Complete Auto*** test, it is clear that the Alabama statute in fact does pass the test.

There can be no doubt of a substantial nexus between those motor carriers who are required to purchase the identification marker and the State of Alabama. Clearly using the highways of a state for a commercial activity must be considered a "substantial nexus" as that term is contemplated in C***omplete Auto***. Furthermore, since everyone who purchases the identification marker is required to pay the same $12.00, whether they are out-of-state motor carriers or Alabama motor carriers who engage in interstate commerce, the tax has to be considered as being fairly apportioned. It is important to remember that <u>everyone</u> pays the same $12.00!

The Association and Truckers have argued that since they are less likely to use the roads of Alabama than carriers from Alabama who are engaged in interstate commerce, this somehow means that the tax is not fairly apportioned. However, it is important to understand that the State is not responsible for this treatment. Each motor carrier may use the highways

of Alabama as often as it likes. Simply because an out-of-state trucker might choose to use Alabama highways less often than an Alabama trucker might on average use the same highways, would not mean that the State is guilty of unequal treatment. It only means that both the non-Alabama-based and the Alabama-based motor carrier have made a conscious choice of where and how often to operate their motor vehicles. The Commissioner would submit that this is the big flaw in the rationale of the Alabama Court of Civil Appeals. It is not the State which would be responsible for any differing results. It would be those out-of-state truckers who consciously choose not to use Alabama highways in their motor carrier operations, and who therefore would not use the Identification Marker as often as the Alabama Motor Carrier, who would be responsible for such treatment.

Furthermore, with regard to the remaining two prongs of the ***Complete Auto*** test, the Alabama identification marker fee does not discriminate against interstate commerce. Both out-of-state and in-state motor carriers who are engaged in interstate commerce must obtain the motor fuel marker. This would leave only those carriers based in Alabama who are not engaged in interstate commerce who would not be required to obtain the Identification Marker. However, as explained above, there is a rational basis why those motor carriers whose vehicles never leave Alabama, and who are identified on the face of their motor vehicles as being subject to Alabama Public Service Commission regulation, are not required to obtain the Alabama Motor Fuel Identification Marker.

Finally, since the proceeds of the fee are deposited into the State Road and Bridge Fund, for the purpose of building and maintaining the very highways which are used by the motor carriers, it can be said

that the Motor Fuel Marker Fee is fairly related to the benefits provided by the State. This is especially true when one also considers that an additional purpose of the motor fuel identification marker is to allow motor carriers engaged in interstate commerce to operate on the highways of Alabama with a minimum of interference from law enforcement officers.

The Commissioner of Revenue submits that **Code of Ala. 1975**, §40-17-150, which requires all motor carriers who operate their vehicles on the highways of Alabama in interstate commerce to obtain a motor fuel identification marker, does not violate the Commerce Clause of the ***United States Constitution***.

II.

WHETHER THE ALABAMA COURT OF CIVIL APPEALS CORRECTLY INTERPRETED THE PREVIOUS DECISION OF THE UNITED STATES SUPREME COURT IN THE CASE OF *AMERICAN TRUCKING ASSOCIATIONS, INC. v. SCHEINER*, 483 U.S. 266?

In its opinion, the Alabama Court of Civil Appeals held the Alabama Fuel Identification Marker fee to be unconstitutional because:

> The Supreme Court has ruled that a flat-rate Pennsylvania marker fee tax, similar to Alabama's, violated the Commerce Clause. American Trucking Association, Inc. v. Scheiner, 483 U.S. 266 (1987). (Opinion of the Alabama Court of Civil Appeals ***sub judice***, p.4; attached hereto as Appendix B.)

It is the position of the Commissioner that the Pennsylvania taxes involved in the ***Scheiner*** case are

not like, nor even nearly similar to Alabama's Identification Marker Fee. In the Statement of the Facts portion of the ***Scheiner*** decision, the pertinent facts were listed as follows:

> Pennsylvania requires an identification marker issued by the Department of Revenue to be affixed to every motor carrier vehicle. A motor carrier vehicle is a "truck, truck-tractor or combination having a gross weight or registered gross weight in excess of 17,000 pounds. (Citation omitted.)
>
> Until 1980, the fee for the issuance of this marker was $2. In that year the fee was increased to $25, but vehicles registered in Pennsylvania were exempted from the fee. The statute effected this exemption by providing that for each vehicle registered in Pennsylvania the
>
> > marker fee shall be deemed a part of and included in the vehicle registration fee (Citation omitted.)
>
> * * *
>
> This tax was, at least nominally, not imposed on Pennsylvania-registered vehicles. It should be noted, however, that the same statute that increased the marker fee in 1980 to $25 for out-of-state vehicles weighing more than 17,000 pounds also increased Pennsylvania's registration fees for such vehicles by amounts substantially

larger than $25.

> In 1982, Pennsylvania enacted its axle tax and, as noted, reduced the marker fee to $5 per vehicle. The axle tax applies to all trucks, truck tractors, and combinations weighing more than 26,000 pounds, whether registered in Pennsylvania or elsewhere; it requires an annual payment of $36 per vehicle axle. (Citation omitted.) For example, the tax is $72 for a two-axle vehicle and $180 for a five-axle vehicle. If a truck travels less than 2,000 miles in Pennsylvania, however, it is entitled to a rebate: The axle tax paid multiplied by the ratio of the amount by which the vehicles in-state mileage was short of 2,000 miles to 2,000 determines the rebate amount. (Citation omitted.) Moreover, the axle tax is excused when a trucker pays $25 for a trip permit for a period not exceeding five days. (Citation omitted.)
>
> The same statute that enacted the axle tax in 1982 also reduced the registration fees for all weight classes of vehicles of more than 26,000 pounds . . . The amounts of the reduction in all classes were a multiple of $36 per axle which is used as a measure of the axle tax.

American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 at 273, (1987). (Emphasis supplied.)

As can be seen from the above-quoted Statement of Facts included in the ***Scheiner*** case, this Honorable Court was not considering a marker fee similar to the Alabama fee when it ruled the Pennsylvania statutory scheme unconstitutional. Instead, the Commissioner contends this Honorable Court was considering two separate taxes. The first tax was an "axle tax" which reduced the registration fees for all weight classes of Pennsylvania-registered vehicles in multiples of $36.00 per axle, which was the amount of tax imposed on non-resident motor carriers. The second tax considered was a motor fuel marker tax which was "deemed" to be a part of Pennsylvania's motor vehicle registration fee.

These characteristics of the Pennsylvania statute are substantially different from the facts involved in the present proceeding. For instance, this Honorable Court's decision recognized that the Pennsylvania Marker Tax "deemed" Pennsylvania-registered vehicles to be **exempt** from, and foreign-registered vehicles to be **subject to**, the Pennsylvania Marker Decal Fee. (483 U.S. at 275.)

The same is not true of the Alabama Identification Marker Fee. All Alabama motor carriers who purchase motor fuel outside Alabama, and use such motor fuel in the operation of their motor vehicles on Alabama highways, must have the same marker affixed to their vehicle as non-resident motor carriers doing the same. The fee for the marker is the same for both the Alabama motor carriers and the non-resident motor carriers, i.e., $12.00.

In this Honorable Court's majority decision which invalidated the two Pennsylvania statutes, the Court first laid the following basis for its decision in ***Scheiner***.

> Although we have described our own

> decisions in this area as a 'quagmire' of judicial responses to specific state tax measures, (citation omitted), we have steadfastly adhered to the central tenet that the Commerce Clause by its own force created an area of trade free from interference by the States. (Citations omitted.) One primary consequence of this constitutional restriction on state taxing powers, frequently asserted in litigation is that 'a State may not tax a transaction or incident more heavily when it crosses a state line than when it occurs entirely within the State.' (Citations omitted.) In its guarantee of a free trade area among States, however, the Commerce Clause has a deeper meaning that may be implicated even though state provisions, such as the ones reviewed here, do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory. (Footnote omitted.)

American Trucking Associations, Inc. v. Scheiner, 483 U.S. at 280. (Emphasis supplied.)

The footnote alluded to in majority opinion states in pertinent part:

> As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden. For, though 'interstate business must pay its way,' a State consistently with the commerce clause cannot put a

> barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving to Congress the power 'to regulate Commerce with foreign Nations and among the several States . . .' nor may the prohibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect. (Citation omitted.)

American Trucking Associations, Inc. v. Scheiner, 483 U.S. at 280. (Emphasis supplied.)

In reaching a determination as to the constitutionality of the two Pennsylvania statutes, the majority of this Honorable Court in ***Scheiner*** determined the deciding issue to be:

> The precise issue is therefore more subtle: do the methods by which the flat taxes are assessed discriminate against some particular participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause? We find dispositive those of our precedents which make it clear that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States. (Footnote omitted.)

American Trucking Associations, Inc. v.

Scheiner, 483 U.S. at 282. (Emphasis supplied.)

If this is the test for the constitutionality of a State statute under the Commerce Clause that came out of ***Scheiner***, then there can be no doubt but that the Alabama Marker Fee passes constitutional muster. The Alabama statute does not impose a heavier tax burden on out-of-state businesses that compete in the interstate market than it imposes on its own residents who do the same. Both the Alabama residents who engage in interstate commerce and the nonresidents pay exactly the same fee, i.e., $12.00. Thus, the Commissioner submits that even under the ***Scheiner*** test (which the Court of Civil Appeals determined to be dispositive of the constitutionality of the Alabama statute), the Alabama Identification Marker Fee is not unconstitutional as being in violation of the Commerce Clause.

It appears that this Honorable Court held in the ***Scheiner*** case, ***supra***, that state taxes ought to be neutral for Commerce Clause purposes. The Commissioner submits that the Alabama statute must be considered to be as neutral as it could possibly be when considering the treatment of Alabama truckers compared to treatment of out-of-state truckers. Everyone, both Alabama based truckers and out-of-state truckers, are charged the same fee, i.e., $12. Nothing could be more neutral than this treatment. Everyone is allowed to use the fuel marker on Alabama's highways as much as they would like. Nothing could be more neutral than this treatment. The fact that out-of-state truckers ***on average*** might ***choose*** not to use the highways of Alabama in interstate commerce as much as Alabama-based truckers should not cause the marker fee to be unconstitutional. Imposition of the

$12 fee does not mean that Alabama is imposing a heavier tax burden on out-of-state truckers. It only means that those out-of-state truckers who "on average" **choose** not to use Alabama highways as much as Alabama-based truckers may statistically be said to bear a heavier tax burden. However, this choice belongs to the truckers alone. The State of Alabama does not impose a heavier tax burden on out-of-state truckers. It is the truckers themselves who do this by electing not to use Alabama highways as often.

While statistics can be said "to prove anything," the reality is that if a heavier tax burden does in fact result, then it is not through the imposition of the flat $12 fee, but instead it is the result of an election by the out-of-state truckers who **choose** not to operate as often on Alabama highways as Alabama-based truckers. The point is, that if this "statistical" burden exists at all, it is not due to the **State's** imposition of the flat $12 fee, but in fact results from the behavior of the out-of-state truckers themselves.

The Court of Civil Appeals ruled the Alabama statute unconstitutional solely because this Honorable Court in the ***Scheiner*** case ruled that a flat-rate Pennsylvania marker fee tax, "similar to Alabama's violated the Commerce Clause." In this the Court of Civil Appeals was mistaken. It is the position of the Commissioner of Revenue that even a cursory reading of the facts involved in the ***Scheiner*** case would demonstrate that the Pennsylvania statute involved in the ***Scheiner*** case was not "similar to Alabama's." For this error, the Commissioner submits that the Opinion of the Court of Civil Appeals is due to be overturned, reversed and otherwise set aside.

CONCLUSION

For the reasons stated, and because the highest court of Alabama decided constitutional issues in conflict with this Honorable Court's decisions in ***Complete Auto Transit v. Brady*** and ***American Trucking Associations, Inc. v. Shiner***, and other decisions of this Honorable Court, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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COUNSEL FOR PETITIONER
COMMISSIONER OF REVENUE

No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1995

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of
the State of Alabama,

Petitioner,

versus

OWNER-OPERATOR INDEPENDENT DRIVERS
ASSOCIATION, INC., ET AL.,

Respondents.

PROOF OF SERVICE

I, John J. Breckenridge, an attorney for the Commissioner of Revenue, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1996, I served copies of the foregoing Jurisdictional Statement on all parties required to be served as follows:

1. On attorneys for all Respondents herein, by depositing a copy in the United States mail, properly addressed to their attorneys of record, as follows:

Paul D. Cullen, Esq.
K. Michael O'Connell, Esquire
Daniel J. Harrold, Esquire
Jeffery L. Poston, Esquire of
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, NW, Suite 400
Washington, D.C. 20007

and

John A. Henig, Jr., Esquire of
COPELAND, FRANCO, SCREWS & GILL
P.O. Box 347
Montgomery, AL 36103-0347;

2. The Clerk of the Supreme Court of Alabama, and;

3. The Clerk of the Alabama Court of Civil Appeals;

with first-class postage prepaid on this the 7th day of February 1996.

JOHN J. BRECKENRIDGE, Assistant Counsel
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COUNSEL FOR PETITIONER
COMMISSIONER OF REVENUE

APPENDIX

IN THE SUPREME COURT OF ALABAMA
November 9, 1995

1940796
Ex parte Ralph P. Eagerton, Jr., as Commissioner of Revenue, and a successor to James M. Sizemore, Jr., as Commissioner of Revenue. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: James M. Sizemore, Jr., as Commissioner of Revenue, et al. v. Owner-Operator Independent Drivers Association, Inc., et al.) (AV93000613) (Montgomery: CV-91-1477)

CERTIFICATE OF JUDGEMENT
Writ Denied

The above cause having been duly submitted. IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COOK, J. - Hooper, CJ., Maddox, Shores, Kennedy, Ingram and Butts, JJ., concur

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 9th day of Nov., 1995

/s/ Robert G. Esdale
Clerk,
Supreme Court of Alabama

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 (205) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA
COURT OF CIVIL APPEALS
OCTOBER TERM, 1994-95

AV93000613

James M. Sizemore, Jr., as Commissioner of Revenue, et al.

v.

Owner-Operator Independent Drivers Association, Inc., et. al.

Appeal from Montgomery Circuit Court
(CV-91-1477)

THIGPEN, Judge

This is a tax case concerning the constitutionality of Ala. Code 1975, § 40-17-150.

In June 1991, the Owner-Operator Independent Drivers Association Inc., et al. (Association) filed a class action challenging the constitutionality of Ala. Code 1975, § 40-17-150, a provision of Article 3 entitled "Motor Carrier Fuel Tax." The action was filed against James M. Sizemore, Jr., Commissioner of the Alabama Department of Revenue, and other state officials (collectively referred to as Sizemore). Inter alia, the Association alleged that the statute imposed a tax on foreign motor carriers, referred to as a marker tax, which, it alleged, is an unconstitutional burden on interstate commerce and violates the Association's rights under several provisions of the United States Constitution. The Association requested a declaratory

judgment holding that § 40-17-150 is unconstitutional and void; a permanent injunction against the collection of the tax; an order directing refund of previously collected taxes, with interest; and attorney fees and costs.

The Association's motion to escrow the tax proceeds collected, pursuant to the statute, was granted. The trial court also granted class action certification pursuant to Rule 23, A.R.Civ.P. The trial court granted the Association's motion for a partial summary judgment on the issue of liability, and it concluded that the marker tax statute and its enforcement violate the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution, and 42 U.S.C. § 1983. Subsequently, the trial court also granted the Association's motion for a partial summary judgment on the issue of the appropriate remedy, and, inter alia, enjoined Sizemore from collecting the marker tax and awarded the members of the class a refund on marker taxes paid. Ultimately, the trial court made these orders final, pursuant to rule 54 (b), A.R.Civ.P. Sizemore appealed.

Sizemore raises several issues on appeal: (1) whether § 40-17-150 violates the Commerce Clause of the United States Constitution; (2) whether the marker tax statute violates the Privileges and Immunities Clause of the United States Constitution; (3) whether the trial court erred in certifying this action as a class action; and (4) whether the trial court erred in ordering the tax proceeds held in escrow.

Ala. Code 1975, § 40-17-150, provides for an annual identification marker fee of $12 for certain motor vehicles, including motor vehicles with capacity for more than 9 passengers and vehicles with more than two axles. Ala. Code 1975, § 40-17-140. A tax on motor carrier fuel used in Alabama is imposed by Ala. Code 1975, § 40-17-141. The proceeds from the marker tax are deposited into the public road and bridge fund. Ala. Code 1975, § 40-17-150 (f). Other provisions of the statute address the collection, reporting, and crediting

of the tax.

Sizemore first argues that the trial court erred in entering the summary judgment for the Association on its claims that the marker tax violates the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution.

The law regarding summary judgement is well established. A motion for summary judgement tests the sufficiency of the evidence. Such a motion is to be granted when the trial court determines that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. Rule 56, A.R.Civ.P. The moving party bears the burden of negating the existence of a genuine issue of material fact. Melton v. Perry County Board of Education, 562 So. 2d 1341 (Ala. Civ. App. 1990). Furthermore, when a motion for summary judgement is made and supported as provided in Rule 56, the nonmovant may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Rule 56 (e), A.R.Civ.P. Proof by substantial evidence is required. Ala. Code 1975, § 12-21-12; Bass v. Southtrust Bank of Baldwin County, 538 So. 2d. 794 (Ala. 1989). The reviewing appellate court must apply the same standard utilized by the trial court when reviewing a summary judgment. Melton, supra. Additionally, the entire record is reviewed in a light most favorable to the nonmovant. Mann v. City of Tallassee, 510 So. 2d 222 (Ala. 1987).

A state tax can withstand a Commerce Clause challenge if

> "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274,

279 (1977). The Supreme Court has ruled that a flat-rate Pennsylvania marker fee tax, similar to Alabama's, violated the Commerce Clause. American Trucking Association, Inc. v. Scheiner, 483 U. S. 266 (1987).

The Association presented as evidence an affidavit of Robert N. Fenili, who had performed statistical studies and had determined that the cost of the marker fee tax was 6 times greater for non-Alabama-based carriers than for Alabama-based carriers; thus, he said, the effect of the statute is to discriminate against interstate commerce. Sizemore presented nothing to dispute the discriminatory effect of the marker fee tax. Since there is no genuine issue of material fact as to whether the statute has a discriminatory effect on interstate commerce, the trial court properly entered the summary judgement for the Association on the basis of a Commerce Clause violation. Having determined this, we pretermit discussion of the issue regarding the Privileges and Immunities Clause.

Sizemore next argues that the trial court erred in certifying the action as a class action pursuant to Rule 23, A.R.Civ.P. Rule 23 (a) sets out four prerequisites of a class action:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Rule 23 (b) further provides that a class action may be maintained if the prerequisites are satisfied and:

> "(1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> "(A) inconsistent or varying adjudications with respect to individual mem-

bers of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In order for a trial court to properly certify a class action, all the requirements of Rule 23 (a), and one of the requirements of Rule 23 (b), must be satisfied. Marshall Durbin & Co. of Jasper, Inc. v. Jasper Utilities Board, 437 So. 2d 1014 (Ala. 1983). Whether to certify

a class action is within the discretion of the trial court. Ex parte Hayes, 579 So. 2d 1343 (Ala. 1991).

After reviewing the record, including affidavits and exhibits, we determine that the trial court did not err in certifying this action as a class action. The record discloses that the plaintiff class may be composed of several thousand members and that the constitutional challenge to the marker tax is common to all members of the class defined by the trial court's order certifying the class. The record does not reveal any evidence that the claims of the class representatiaves are not typical of the class as a whole, or that the class representatives will not adequately represent the interests of the entire class. Sizemore's argument that the class action is barred on the grounds of sovereign immunity is unpersuasive. Our Supreme Court has determined that a class action was a proper remedy for the "recovery of any taxes which were paid illegally." Thorn v. Jefferson County, 373 So. 2d 780, 788 (Ala. 1979).

Sizemore's final contention is that the trial court erred in allowing the disputed tax proceeds to be placed in an escrow account. Sizemore argues that the trial court fashioned a "new remedy" by deeming the payments to be paid under protest and creating an escrow account. He argues that this is a "dangerous precedent" that could permit any Alabama trial court to decide it has the power to suspend tax payments and hold proceeds until its further order.

The Association's motion initially sought a preliminary injunction pursuant to Rule 65 (b), A.R.Civ.P., escrowing the proceeds. Sizemore opposed the motion, and, after providing the parties opportunity to present authorities and argument, the trial court ordered that payments made after October 1, 1991, "shall be deemed to be made under protest pursuant to Ala. Code § 40-1-11, and such sums so paid shall be held by the State of Alabama, pursuant to Ala. Code § 40-1-12, in an identified suspense account until further order of this Court."

Ala. Code 1975, § 40-1-12 (repealed by Ala. Acts 1992, No. 92-186, § 80, effective October 1, 1992), which was in effect at the time of this action, provided that taxes paid under protest are to be held "in an identified suspense account until it is judicially determined whether the taxes were legally levied and collected." Thus, the statutes in effect at the time of this action expressly permitted the trial court to place the proceeds in an escrow account until a judicial determination was made, and we find no error in the trial court's decision regarding the escrow.

Based on the foregoing, the judgment of the trial court is due to be, and it is hereby, affirmed.

AFFIRMED.

Robertson, P.J., and Yates

OFFICE OF

CLERK OF THE COURT OF CIVIL APPEALS

STATE OF ALABAMA

MONTGOMERY

Circuit Court No. CV 91-1477

RE: AV93000613.00 February 17, 1995

James M. Sizemore, Jr., as Commisioner of Revenue, et al vs. Owner-Operator Independent Drivers Association, Inc., et al

Appellant Appellee

You are herby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

____ Court Reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell ____ granted 7 additional days to file brief(s) to and including

____ Appellant(s) granted 7 additional days to file reply brief(s) to and including

____ Record on Appeal filed on this date.

____ Submitted on Briefs

XXX Application for rehearing overruled. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted

____ Rules suspended

____ Transferred to the Supreme Court for lack of jurisdiction. A/N

____

/s/ John Wilkerson, Jr.
Clerk,
Court, of Civil Appeals
of Alabama

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., et al.,	)	
Plaintiffs,	)	**Civil Action**
v.	)	**No. 91-1477-PR**
JAMES M. SIZEMORE, JR., et al.	)	
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

The Court, having considered Plaintiffs' Motion for Partial Summary Judgment on the Issue of Liability, the affidavits submitted by Plaintiffs in support of their Motion, the briefs and authorities submitted by the Plaintiffs, briefs and authorities submitted by the Defendants in opposition to this Motion and the Court having informed itself fully in the premises, and it appearing that there are no genuine issues of fact on the issue of liability, and that partial summary judgment on the issue of liability ought to be granted, the Court hereby finds as follows:

FINDINGS OF FACT

1. Motor carriers defined in Ala. Code § 40-17-140(2) pay for the privilege of using the highways of the State by paying a per gallon tax on fuel consumed within the State. Ala. Code § 40-17-142(a). Carriers which purchase fuel within Alabama pay this tax at the fuel pump when they make a purchase. The Motor Carrier Fuel Tax. Ala. Code § 40-17-140 et seq. (1975), provides for the payment of this tax on fuel purchased outside Alabama but consumed in transit within the State. If the amount of tax due on account of miles travelled

within the State exceeds the amount paid at the fuel pump at the time of purchase, the motor carrier is required to pay the difference when it files its quarterly tax return with the Department of Revenue. Id.

2. In order to enforce the Motor Carrier Fuel Tax statutory scheme, certain motor carriers operating motor vehicles within the State of Alabama must register each such motor vehicle annually as a condition precedent to their operation within Alabama. Such motor carriers receive identification markers for display on each such motor vehicle evidencing its registration under the Motor Carrier Fuel Tax, Ala. Code § 40-17-150 (hereinafter "Marker Tax"). Identification markers are issued annually and are valid through the applicable calendar year.

3. Ala. Code § 40-17-150 requires a payment of $12.00 for each identification marker issued to a motor carrier pursuant to its provisions. Since the amount of this tax or fee greatly exceeds the actual cost of issuing identification markers, the fee is a tax imposed for the purpose of raising revenue.

4. Operation of any motor carrier vehicle within Alabama that is not in compliance with the Motor Carrier Fuel Tax registration requirements violates Ala. Code § 40-17-155. Violations of this provision are punishable as a Class B misdemeanor pursuant to that provision.

5. The cost per mile driven in Alabama incurred by interstate nonAlabama-based motor carriers for obtaining an identification marker is, on average, 6.86 times greater than the cost per mile driven in Alabama incurred by interstate Alabama motor carriers.

LEGAL FINDINGS

6. State taxes or fees which discriminate against interstate commerce are invalid under the Commerce Clause of the U.S. Constitution. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

7. The Alabama Marker Tax violates the Commerce Clause because it discriminates against interstate

commerce on its face. Ala. Code § 40-17-140(2) exempts two classes of resident motor carriers — single truck, private resident carriers and all intrastate resident carriers — from the marker fee, thereby imposing its pecuniary burden on only nonresident motor carriers and resident, multi-vehicle carriers operating in interstate commerce. The statute is thus discriminatory on its face and hence violates the Commerce Clause. Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 324-35 (1977).

8. The Alabama Marker Tax is not fairly apportioned because it discriminates against interstate commerce in practical effect. Since the cost per mile driven in Alabama incurred by interstate nonAlabama-based motor carriers for obtaining an identification marker is, on average, 6.86 times greater than the cost per mile driven in Alabama incurred by interstate Alabama-based motor carriers, discrimination exists as a matter of law. Such discrimination is illegal under the Commerce Clause of the U.S. Constitution. American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266, 286 (1987).

9. The Privileges and Immunities Clause of the U.S. Constitution protects certain fundamental rights and guarantees to nonresident motor carriers the privilege of doing business in Alabama on an equal basis with the citizens of Alabama. Among the fundamental rights of nonresidents protected by the Privileges and Immunities Clause are the right to interstate travel, the right to travel into another state to conduct lawful business undisturbed, and the right to be exempt from any higher taxes or excises than are imposed on resident citizens. The Alabama Marker Tax violates the Privileges and Immunities Clause by restricting interstate travel into the State of Alabama for the conduct of lawful business. It effects this restriction by imposing a higher tax on nonresident motor carriers, which is both facially discriminatory and discriminatory in practical effect, than it does on resident motor carriers. Accordingly, the Marker Tax violates the Privileges and Immunities Clause. Toomer v. Witsell, 334 U.S. 385,

395 (1948).

10. Pursuant to 42 U.S.C. § 1983, persons acting under color of state law are subject to liability for constitutional violations stemming from their actions. State agencies and state officials acting in their official capacities are "persons" under Section 1983 and may be held liable in declaratory and injunctive relief actions under Section 1983. Commerce Clause violations are actionable under Section 1983. Dennis v. Higgins, 111 S.Ct. 865 (1991). Because the actions by State of Alabama agencies and officials in enforcing the Marker Tax constitute violations of Plaintiffs' rights under the Commerce Clause, these violations also create liability under Section 1983 for depriving Plaintiffs' of civil rights.

Plaintiff's Motion for Partial Summary Judgment is hereby granted.

It is further ordered and decreed that a pretrial conference shall be held on _____ , 1993 to establish a schedule for disposing of issues related to remedy.

Dated this 1 day of Nov, 1993.

/s/Charles Price
Judge,
Circuit Court of Montgomery
County, Alabama

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., et al.,	)	
Plaintiffs,	)	**Civil Action**
v.	)	**No. 91-1477-PR**
JAMES M. SIZEMORE, JR., et al.	)	
Defendants.	)	

INTERIM FINAL JUDGMENT

The Court, having considered Plaintiffs' Motion for Partial Summary Judgment on the Issue of Remedy, the affidavit submitted by Plaintiffs in support of their Motion, the briefs and authorities submitted by the Plaintiffs, the briefs and authorities submitted by the Defendants in opposition to this Motion, and the Court having informed itself fully in the premises, and it appearing that there are no genuine issues of fact on the question of remedy, and that partial summary judgment on the question of remedy ought to be granted, the Court hereby finds as follows:

Factual Findings

1. In order to enforce the Motor Carrier Fuel Tax statutory scheme set forth in Ala. Code § 40-17-142(a) (1975), certain motor carriers operating motor vehicles within the State of Alabama must register each such motor vehicle annually as a condition precedent to their operation within Alabama. Such motor carriers receive identification markers for display on each such motor vehicle evidencing its registration under the Motor Carrier Fuel Tax, Ala. Code § 40-17-150 (1975) (hereinafter "Marker Tax"). Identification markers are issued annually and are valid through the applicable calendar year. Such markers can also be purchased on a per trip basis.

2. Ala. Code § 40-17-150 requires a payment of $12.00 for each identification marker issued to a motor carrier pursuant to its provisions.

3. Operation of any motor carrier vehicle within Alabama that is not in compliance with the Motor Carrier Fuel Tax registration requirements violates Ala. Code § 40-17-155 (1975). Violations of this provision are punishable as a Class B misdemeanor pursuant to that provision.

4. Alabama law does not provide for any pre-deprivation procedures which would enable taxpayers to challenge the validity of Ala. Code § 40-17-150 prior to paying the $12.00 tax.

5. Named Plaintiffs Shirley A. Wendt d/b/a Shirley's Express ("Shirley's"), Douglas & Sons, Inc. ("Douglas") and Gary Sprague d/b/a Lazy S. Trucking Co., Inc. ("Lazy S.") each filed protests of the 1991 Marker Tax pursuant to Ala. Code § 40-1-11 (1975) (repealed) within sixty days of the filing of this action. These protests were open matters as of October 1, 1992 within the meaning of a Ala. Code § 40-1-44 (1992 Supp.).

6. Named Plaintiffs Shirley's, Douglas, Lazy S., Weir Motor Freight Corp. ("Weir"), Charles L. King d/b/a Exempt Commodities Transport ("King"), James Seibert d/b/a Seibert Farms ("Seibert") and B.B. Express, Inc. ("B.B. Express") filed refund requests on September 25, 1991 pursuant to Ala. Code § 40-1-34 (1975) (repealed).
These refund requests were open matters as of October 1, 1992 within the meaning of Ala. Code § 40-1-44 (1992 Supp.).

7. Named Plaintiffs Shirley's, Weir, King, Seibert and B.B. Express all protested the 1992 Marker Tax pursuant to Ala. Code § 40-1-11 (1975) (repealed). These protests were all open matters as of October 1,

1992 within the meaning of Ala.Code § 40-1-44 (1992, Supp.).

8. This Court ordered on October 2, 1991 that "[a]ll payments of the [Marker Tax] on or after October 1, 1991 shall be deemed to be made under protest pursuant to Ala. Code § 40-1-11, and such sums [shall] be held by the State ... in an identified expense account until further order of this Court." The protests covered by the Court's October 2, 1991 Order were all open matters as of October 1, 1992 within the meaning of Ala. Code § 40-1-44 (1992 supp.).

9. This Court found on November 1, 1993 that the Marker Tax was facially discriminatory against all multi-vehicle interstate motor carriers and discriminatory in effect against non-Alabama based interstate motor carriers. November 1, 1993, Order. This Court found that this conduct violated the Commerce and Privileges and Immunities Clauses of the U.S. Constitution, and 42 U.S.C. § 1983 (1988). Id.

LEGAL FINDINGS

10. Where constitutional and federal law violations exist, the Due Process of Law Clause of the Fourteenth Amendment to the U.S. Constitution requires that the Defendants provide meaningful, backward-looking relief to the Plaintiff Class.

11. Since the nature of the discrimination found to exist is not in the amount of the tax collected but rather in the unequal burden that the tax places on in-state and out-of-state taxpayers respectively, there is no practical alternative for providing meaningful backward-looking relief other than providing full refunds for all Marker Taxes paid.

12. Members of the Plaintiff Class are not required to exhaust their administrative remedies by filing individual refund claims and protests with Defendants.

13. The Plaintiff Class is entitled to have a Common Fund established, said Fund to include all refunds due together with pre-judgment and post-judgment interest.

14. The Plaintiff Class is entitled to full refunds on all Marker Taxes (both annual fees and trip permits) escrowed pursuant to this Court's Order dated October 2, 1991, and deemed to be paid-under-protest within the meaning of Ala. Code § 40-1-11 (1975) (repealed).

15. The Plaintiff Class is entitled to full refunds for all Marker Taxes (both annual fees and trip permits) paid during the three-year period starting September 2, 1988, said sums having been paid under mistake or error within the meaning of Ala. Code § 40-1-34 (1975) (repealed).

16. The Plaintiff Class is entitled to pre-judgment interest on all refunds of Marker Taxes (annual fees and trip permits) included in this Interim Final Judgment pursuant to Ala. Code § 40-2A-7(c) (Code Note) (1992 Supp.). Such interest is to be calculated pursuant to Ala. Code § 40-1-44(a) & (b) (1992 Supp.).

17. The Plaintiff Class is entitled to post-judgment interest on all sums, ordered to be paid herein pursuant to Ala. Code § 8-8-10 (1975).

18. All sums payable pursuant to paragraphs 13-17 above shall become part of the Common Fund under the jurisdiction of this Court.

19. Counsel for the Plaintiff Class are entitled to petition for an award of reasonable counsel fees and litigation expenses out of the Common Fund established hereunder.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF REMEDY IS HEREBY GRANTED;

AND IT IS FURTHER ORDERED

20. Starting on the 30th day following the date on which this Interim Final Judgment becomes final, Defendants are enjoined from collecting the $12.00 Marker Tax (annual fee and trip permit) presently provided for in Ala. Code § 40-17-150 (1975).

21. Within 30 days following the date on which this Interim Final Judgment becomes final, Defendants will prepare and turn over to Class Counsel lists in computer readable format of all Marker Taxes (annual fees and trip permits) issued and paid for on or after September 25, 1988. Said lists shall include the name and address of the taxpayer of record, the date and amounts paid as well as such further information as will aid in the implementation of a refund distribution plan.

22. Within 60 days of the date that this Interim Final Judgment becomes final, Class Counsel will prepare and file with the Court a proposed refund distribution plan. Class Counsel shall consult with counsel for the Defendants respecting the terms of said refund distribution plan. The plan should contain elements similar to refund distribution plans that have been used in similar state truck tax litigation. All counsel shall make a good faith effort to resolve all differences with respect to the plan prior to it being submitted to the Court.

23. Within 60 days following the date on which this Interim Final Judgment becomes final, Class Counsel will submit its petition for reasonable counsel fees and litigation expenses to be paid out of the Common Fund.

24. Counsel shall have two weeks following the sub-

objections. Replies will be due within 10 days thereafter.

25. As soon as practicable after the close of briefing on the proposed refund distribution plan and requested counsel fees and expenses, the Court will convene a hearing to resolve any outstanding issues. The Court will thereafter enter an order approving a refund distribution plan and reasonable counsel fees and litigation expenses and directing such publication and notice to the Class as may be required under the rules of the Court.

26. The Court will retain jurisdiction over this matter in order to supervise the implementation of the refund distribution plan and to enter such further orders as may from time to time be necessary or appropriate.

Dated this 12 day of Jan , 1994.

/s/Charles Price
Judge,
Circuit Court of Montgomery
County, Alabama

cc: John A. Henig, Jr.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., et al.,	)	
Plaintiffs	)	**Civil Action**
vs.	)	**No. CV91-1477-PR**
JAMES M. SIZEMORE, JR., Commissioner of the Alabama Department of Revenue, et al	)	
Defendants	)	

ORDER AND FINAL JUDGMENT

Having considered Plaintiffs' Motion for a Rule 54(b) Certification, the Court finds that there is no just reason to delay the entry of a final judgment as to the issue of liability and the general form of the remedy and that it would serve the interests of justice to enter a final appealable order before implementation of a complex class action distribution is required;

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to Alabama Rule of Civil Procedure 54(b), that there being no just reason for delay, the Court's Order of November 1, 1993, on the liability issue and the Court's Interim Final Judgment entered January 12, 1994, on the remedy issue are hereby made the final judgment of this Court and the Clerk of the Court is directed to so certify in the official record of this proceeding;

IT IS FURTHER ORDERED, that implementation of paragraphs 20-26 of the January 12, 1994 Interim Final Judgment is stayed pending any appeal that may be taken in this proceeding.

DONE this the 7 day of Feb , 1994.

/s/ Charles Price
Circuit Judge

cc: John A. Henig, Jr.
Paul D. Cullen
S. Powers Lambert
Jack M. Curtis
John J. Breckenridge

§ 40-17-150. Identification marker for motor vehicles.

(a) The commissioner shall provide by regulation for the issuance of an identification marker for every such motor vehicle for a fee of $12.00 per vehicle per year. The identification marker shall be in such form and of such size as the commissioner may prescribe.

(b) Such identification marker shall be attached or affixed to the vehicle in the place and manner prescribed by the commissioner so that the same is clearly displayed at all times.

(c) The identification markers herein provided for shall be issued on an annual basis as of January 1 each year and shall be valid through the next succeeding December 31.

(d) All identification markers issued by the commissioner shall remain the property of the state.

(e) For tour buses, as defined in subdivision (10) of Section 40-19-1, the fee levied by this section (fuel identification marker fee or trip permit fee) and the motor carrier registration fee levied pursuant to paragraph a. of subdivision (5) of Section 37-3-32 shall be paid by a single payment which may be paid by check, money order, or other means as may be provided by regulation and shall be submitted to the Department of Tourism and Travel payable to the Department of Revenue.

(f) The proceeds from the issuance of the identification marker fees collected shall accrue to the credit of, and be deposited in, the public road and bridge fund.

(g) It shall be a violation of this article for a motor carrier to operate or cause to be operated in this state any motor vehicle as defined herein unless the motor vehicle displays the required identification marker in the manner designated by the commissioner; provided, that the commissioner by regulation may exempt from the requirement for displaying the identification marker such motor vehicles as urban and public transit motor vehicles or others if in his discretion they are clearly identifiable and the effective enforcement of this

article will not suffer thereby.

(h) In addition, the Commissioner of Revenue may authorize the operation of a motor vehicle without the identification marker required by issuing a trip permit, valid for not exceeding seven days, for a fee of $12 payable in advance. Trip permits are to be obtained by motor carriers having only occasional or infrequent trips into and through the state. To be valid a trip permit must be supported by a valid invoice of current date showing that sufficient tax-paid fuel was purchased in the state to propel the vehicle for the number of miles it traveled over the highways of the state.

(i) In order for the department to have sufficient time in which to prepare the identification markers for transmittal to the motor carrier, every motor carrier subject to this article shall, between the dates of October 1 and November 15 of each year, furnish to the Department of Revenue an application, listing all motor vehicles operated by the motor carrier and for which an identification marker is required, giving for each vehicle the make, serial number, and type fuel used. Such application shall be accompanied by a remittance in an amount sufficient to cover the fee or fees herein provided for.

(j) Motor carriers acquiring additional motor vehicles after the date of November 15 of each year must obtain an identification marker for each such motor vehicle before operating said motor vehicle over the streets and highways of this state. (Acts 1961, No. 674, p. 925, § 11; Acts 1965, No. 750, p. 1357, § 6; Acts 1971, No. 1408, p. 2403; Acts 1992, 2nd Ex. Sess., No. 92-710, p.205, § 2.)

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

No. 95-1260

In The

Supreme Court of the United States

October Term, 1995

RALPH P. EAGERTON, JR., AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, *et al.*,

Petitioners,

v.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Alabama Court of Civil Appeals correctly interpreted *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), when it found that Code of Alabama 1975, section 40-17-150, violated the Commerce Clause of the United States Constitution because it imposed a cost-per-mile driven in Alabama that was, on average, at least 6.78 times greater for non-Alabama-based interstate motor carriers than it was for Alabama-based interstate motor carriers?

LIST OF PARTIES TO PROCEEDINGS BELOW

Petitioners (Defendants-Appellants Below):

James M. Sizemore, Jr., Commissioner of Revenue of the State of Alabama, now succeeded by Ralph P. Eagerton, Jr., Honorable Guy Hunt, Governor of Alabama, now succeeded by the Honorable Forest Hood James, Governor of Alabama, James H. Evans, Attorney General of the State of Alabama, now succeeded by Jeff Sessions, Attorney General of the State of Alabama, and Commissioners James Sullivan, Charles Martin and Janice Cook of the Alabama Public Service Commission.

Respondents (Plaintiffs-Appellees Below):

Owner-Operator Independent Drivers Association, Inc., Shirley A. Wendt d/b/a Shirley's Express, Douglas and Sons, Inc., B.B. Express, Inc., Gary M. Sprague d/b/a Lazy S. Trucking Co., Inc., Weir Motor Freight Corp., Charles L. King d/b/a Exempt Commodities Transport, Siebert Farms, Inc., and Charles H. Floyd d/b/a Enterprises, Inc.

None of the corporate Respondents has a parent corporation or a nonwholly owned subsidiary that would be required to be listed pursuant to Supreme Court Rule 29.6.

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Act of Apr. 21, 1994, No. 586, § 7, 1994 Ala. Acts 1078, 1081-83 3-4

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Owner-Operator Independent Drivers Association, Inc., *et al.*, on behalf of themselves and as class representatives of others similarly situated, respectfully request that this Court deny Petitioners' Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, *et al.*, Petition for a Writ of Certiorari (the "Petition") seeking review of the Certificate of Judgment of the Supreme Court of Alabama denying Petitioners' Petition for Writ of Certiorari for review of the decision of the Alabama Court of Civil Appeals. The Certificate of Judgment of the Supreme Court of Alabama appears in Appendix A ("App. A") of the Petition, and the Opinion of the Alabama Court of Civil Appeals appears in Appendix B ("App. B") of the Petition.

STATUTES INVOLVED

In addition to the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, and the 1975 Alabama statute codified at Ala. Code § 40-17-150 (1975), both included as appendices to the Petition, this brief involves one federal statute, 49 U.S.C.A. § 31705 (1995), and two additional Alabama statutes, Ala. Code § 40-17-140 (1975) and Ala. Code § 40-17-150 (Supp. 1995). The complete text of each statute is set forth in Appendix H, Appendix I, and Appendix J, respectively.

COUNTERSTATEMENT OF THE CASE

This is a class action proceeding involving a challenge to the constitutionality of an identification marker fee established under former Ala. Code § 40-17-150 (1975) (hereinafter the "Marker Fee"). *See* Appendix G to Petition ("App. G") at 1g-2g. This provision imposed a fee of $12.00 for an identification marker or decal to be displayed upon each vehicle operated by an interstate motor carrier traveling into or through the State of Alabama during a given tax year.[1] In addition to raising revenue, the purpose of this requirement was to demonstrate the vehicle's compliance with the State's fuel use tax reporting system. Section 40-17-140(2) of the 1975 Alabama Code establishes the definition of "motor carrier" in such a way as to exempt from the identification Marker Fee all intrastate carriers and single vehicle not-for-hire interstate carriers.[2]

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[1] The Alabama statute, in pertinent part, provided as follows:

> (a) The commissioner shall provide by regulation for the issuance of an identification marker for every such motor vehicle for a fee of $12.00 per vehicle per year. The identification marker shall be in such form and of such size as the commissioner may prescribe.

Ala. Code § 40-17-150 (1975); for the full text of the statute, *see* App. G to Petition.

[2] Subsection (2) of section 40-17-140 defines "motor carrier" as:

> Every person, firm, or corporation who or which operates or causes to be operated on any highway in this state any motor vehicle, as defined herein, *except any resident person, firm, or corporation owning or*

The Circuit Court for Montgomery County entered summary judgment for the plaintiff class holding, *inter alia*, that the Marker Fee violated the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. In particular, that court held that (1) the Marker Fee was facially discriminatory because it was imposed upon interstate motor carriers while intrastate motor carriers and Alabama operators of single trucks not-for-hire remained exempt, and (2) the Marker Fee was also discriminatory in its practical effect because it imposed a cost-per-mile of operation that was, on average, at least 6.78 times greater for non-Alabama-based interstate motor carriers than for Alabama-based interstate motor carriers, citing *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987). *See* Appendix D to Petition ("App. D") at 2d-3d. The Alabama Court of Civil Appeals affirmed the judgment of the Circuit Court. *See* App. B to Petition at 7b. The Alabama Supreme Court denied Petitioners' petition for a writ of certiorari on November 9, 1975. *See* App. A to Petition.

On April 21, 1994 (while this matter was pending on appeal), the State of Alabama amended Ala. Code § 40-17-150 (1975) effectively repealing the provisions of the 1975 Code found to be unconstitutional in this litigation. The Alabama legislature, pursuant to Act of Apr. 21,

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> *operating not more than one such motor vehicle for his own use and not for hire, and except any person, firm or corporation the motor vehicles of which are operated or caused to be operated wholly within this state.*

Ala. Code § 40-17-140(2) (1975) (emphasis added), attached hereto in Appendix I ("App. I").

1994, No. 586, § 7, 1994 Ala. Acts 1078, 1081-83 (codified as amended at Ala. Code § 40-17-150 (Supp. 1995)), authorized the Department of Revenue to enter into the International Fuel Tax Agreement ("IFTA") as mandated by the federal Intermodal Surface Transportation Efficiency Act of 1991 § 4008(g), 49 U.S.C.A. § 31705 (1995) (hereinafter "ISTEA"), attached hereto as Appendix H ("App. H"). The IFTA requires signatories to honor identification markers issued by other signatories of IFTA. The State of Alabama amended Code of Alabama 1975, section 40-17-150, to conform to this requirement. The Code of Alabama 1995 now provides as follows:

> (a) The commissioner shall provide by regulation for the issuance of an annual identification marker for every *Alabama IFTA-based carriers' qualified vehicles* and the *qualified vehicles from non-IFTA-member jurisdictions*, as defined in Article 9 of Chapter 17 of this title, for a *fee based on administrative costs* of administering the agreements pursuant to Article 9 of Chapter 17 of this title. The identification marker shall be in the form and of the size as the commissioner may prescribe.

Ala. Code § 40-17-150 (Supp. 1995) (emphasis added), attached hereto as Appendix J ("App. J"). Thus, section 40-17-150 now provides for a *cost-based* marker fee to be imposed only upon qualified vehicles of *Alabama IFTA-based* carriers and qualified vehicles of carriers from *non-IFTA jurisdictions*. All states are required by federal law to join IFTA by September 30, 1996. 49 U.S.C.A. § 31705(a). As of this writing, it is believed that forty-four of the fifty states have already joined IFTA. As a practical matter, therefore, Alabama no longer imposes the Marker Fee

that was ruled unconstitutional on non-Alabama-based interstate carriers because the overwhelming majority of those carriers are based in other states that are signatories of IFTA. In addition, all fees that are imposed are cost-based fees and not taxes.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE ISSUE RAISED BY PETITIONERS IS WITHOUT CONTINUING IMPORTANCE

A. The State of Alabama Has Amended Its Statute And Eliminated Its Constitutional Defects

The offending statute has been amended by the State of Alabama and thus does not pose an issue of continuing importance. Under Ala. Code § 40-17-150 (Supp. 1995), the State of Alabama has ceased to collect the Marker Fee from non-Alabama IFTA-based interstate motor carriers. The State of Alabama's decision to amend the statute under attack in the proceedings below and to correct its constitutional flaws renders further review by this Court unnecessary.

B. Virtually All Other States Have Abolished Marker Fees Of The Kind Challenged In This Case

Marker fees of the kind at issue here have been uniformly abolished as individual states have, pursuant to ISTEA, implemented the IFTA. States participating in IFTA have agreed to honor identification markers issued by other signatories of IFTA rather than requiring all out-

of-state carriers to pay a tax and acquire a marker. As a consequence, the sole issue raised by Petitioners, whether the Alabama Court of Civil Appeals erred in its application of *Scheiner* to Alabama's identification Marker Fee, is without continuing importance beyond the four corners of this litigation.

II. THE DECISION BELOW THAT ALABAMA'S MARKER FEE DISCRIMINATES IN ITS PRACTICAL EFFECT IS IN HARMONY WITH DECISIONS BY OTHER COURTS OF LAST RESORT

The decision for which review is sought is in complete harmony with the way other courts have followed this Court's decision in *Scheiner*. Like Alabama, other courts have followed *Scheiner* and have uniformly overturned flat taxes of the type at issue here when they were found to be discriminatory in their practical effect.[3]

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[3] *See, e.g., Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, 10 (1st Cir. 1992) (finding unconstitutional a statute under which non-Puerto Rican truckers paid five or six times more per accident than local truckers); *Government Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1281 (7th Cir. 1992) (holding that flat registration fee on out-of-state truck waste haulers resulted in unlawful practical discrimination, similar to the five-to-one cost discrimination that existed in *Scheiner*), *cert. denied, Bayh v. Government Suppliers Consol. Servs., Inc.*, 113 S. Ct. 977 (1993); *American Trucking Ass'ns, Inc. v. Gray*, 746 S.W.2d 377, 378 (Ark. 1988) (declaring per-vehicle HUE tax illegal because it cost non-Arkansas-based truckers more per mile to travel on Arkansas roads than Arkansas truckers), *cert. granted sub nom., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Business Regulation*, 488 U.S. 954 (1988) *and aff'd in part and rev'd in part sub nom., American Trucking Ass'ns, Inc. v. Smith*, 496 U.S.

Petitioners do not point to any confusion or lack of harmony in the way other courts have interpreted and applied *Scheiner*. Petitioners point to no theory under which the Alabama courts are out of step with decisions in other jurisdictions. There is simply no reason for this Court to review a decision by the Alabama courts that is in complete harmony with existing precedent.

III. PETITIONERS DO NOT CHALLENGE THE DECISION BELOW THAT THE ALABAMA MARKER FEE WAS FACIALLY DISCRIMINATORY AND THUS UNCONSTITUTIONAL

The judgment of the Circuit Court for Montgomery County, affirmed by the Alabama Court of Civil Appeals

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167 (1990); *Black Beauty Trucking, Inc. v. Indiana Dep't of State Revenue*, 527 N.E.2d 1163, 1165 (Ind. Tax Ct. 1988) (finding that out-of-state truckers paid up to 48 times more per mile driven in Indiana, under $50.00 per-vehicle highway use fee, than Indiana truckers); *Commonwealth of Ky., Transp. Cabinet v. American Trucking Ass'ns, Inc.*, 746 S.W.2d 65, 67 (Ky. 1988) (finding supplemental $175.00 per-vehicle highway user fees resulted in out-of-state truckers traveling through Kentucky paying three to 100 times more than local truckers); *American Trucking Ass'ns, Inc. v. Secretary of State*, 595 A.2d 1014, 1017 (Me. 1991) (finding that out-of-state truckers paying $25.00 per-vehicle hazardous waste license fee paid up to 49 times more than did local truckers); *American Trucking Ass'ns, Inc. v. Goldstein*, 541 A.2d 955, 957 (Md. 1988) (finding annual $25.00 per-vehicle motor fuel use marker decal an unconstitutional flat tax); *American Trucking Ass'ns, Inc. v. Secretary of Admin.*, 613 N.E.2d 95, 98-103 (Mass. 1993) (holding $7.00 per-vehicle motor fuel use licenses and a $200.00 per-vehicle hazardous waste license fee were unconstitutional flat taxes); *American Trucking Ass'ns, Inc. v. Conway*, 566 A.2d 1335, 1337 (Vt. 1989) (holding $50.00 per-vehicle motor fuel user license an unconstitutional flat tax).

and the Supreme Court of Alabama, held that Ala. Code § 40-17-150 (1975) violated the Commerce Clause of the U.S. Constitution for two reasons: (1) it was discriminatory in its practical effect under *Scheiner*, 483 U.S. at 286; and (2) the statute was facially discriminatory because it was not imposed upon intrastate carriers and single vehicle not-for-hire interstate carriers. *See* App. D to Petition at 2d-3d. Even if the Petition were granted by this Court to review the issue of discrimination in effect under *Scheiner*, there would be no cause to disturb the decision below which would still stand by virtue of the separate finding of facial discrimination, a finding which is *not* challenged in the pending Petition.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

49 U.S.C.A. § 31705 (1995). Fuel use tax.

(a) Reporting Requirements. – After September 30, 1996, a State may establish, maintain, or enforce a law or regulation that has a fuel use tax reporting requirement (including any tax reporting form) only if the requirement conforms with the International Fuel Tax Agreement.

(b) Payment. – After September 30, 1996, a State may establish, maintain, or enforce a law or regulation that provides for the payment of a fuel use tax only if the law or regulation conforms with the International Fuel Tax Agreement as it applies to collection of a fuel use tax by a single base State and proportional sharing of fuel use taxes charged among the States where a commercial motor vehicle is operated.

(c) Limitation. – If the International Fuel Tax Agreement is amended, a State not participating in the Agreement when the amendment is made is not subject to the conformity requirements of subsections (a) and (b) of this section in regard to the amendment until after a reasonable time, but not earlier than the expiration of –

(1) the 365-day period beginning on the first day that States participating in the Agreement are required to comply with the amendment; or

(2) the 365-day period beginning on the day the relevant office of the State receives written notice of the amendment from the Secretary of Transportation.

(d) Nonapplication. – This section does not apply to a State that was participating in the Regional Fuel Tax

Agreement on January 1, 1991, and that continues to participate in that Agreement after that date.

(Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1032.)

Ala. Code § 40-17-140 (1975). Definitions.

For the purpose of this article, the following terms shall have the meanings respectively ascribed by this section:

(1) MOTOR VEHICLE. Any passenger vehicle that has seats for more than nine passengers in addition to the driver, or any road tractor, or any tractor truck, or any truck having more than two axles.

(2) MOTOR CARRIER. Every person, firm, or corporation who or which operates or causes to be operated on any highway in this state any motor vehicle, as defined herein, except any resident person, firm, or corporation owning or operating not more than one such motor vehicle for his own use and not for hire, and except any person, firm or corporation the motor vehicles of which are operated or caused to be operated wholly within this state.

(3) OPERATIONS. Operations of all motor vehicles, whether loaded or empty, whether for compensation or not for compensation, and whether owned by or leased to the motor carrier who operates them or causes them to be operated.

(4) MOTOR FUEL. Gasoline, diesel fuel, and any other inflammable liquid or substance by whatever name it may be known and sold, the use of which is as a fuel for the propulsion of motor vehicles.

(5) COMMISSIONER. The Commissioner of the State Department of Revenue.

(6) GASOLINE TAX. The tax imposed by Article 2 of this chapter and by Article 6 of this chapter.

(7) DIESEL FUEL TAX. The tax imposed by Sections 40-17-1 through 40-17-20 and by Article 6 of this chapter. (Acts 1961, No. 674, p. 925, § 1; Acts 1965, No. 750, p. 1357, § 1; Acts 1980, No. 80-428, p. 595.)

Ala. Code § 40-17-150 (Supp. 1995). Annual identification markers.

(a) The commissioner shall provide by regulation for the issuance of an annual identification marker for every Alabama IFTA-based carriers' qualified vehicles and the qualified vehicles from non-IFTA-member jurisdictions, as defined in Article 9 of Chapter 17 of this title, for a fee based on administrative costs of administering the agreements pursuant to Article 9 of Chapter 17 of this title. The identification marker shall be in the form and of the size as the commissioner may prescribe.

(b) The identification marker shall be attached or affixed to the vehicle in the place and manner prescribed by the commissioner so that the same is clearly displayed at all times.

(c) The identification markers herein provided for shall be issued on an annual basis as of January 1 each year and shall be valid through the next succeeding December 31.

(d) All identification markers issued by the commissioner shall remain the property of the state.

(e) For tour buses, as defined in subdivision (10) of Section 40-19-1, the fee levied by this section (fuel identification marker fee or trip permit fee) and the motor carrier registration fee levied pursuant to paragraph a. of subdivision (5) of Section 37-3-32 shall be paid by a single payment which may be paid by check, money order, or other means as may be provided by regulation and shall be submitted to the Department of Tourism and Travel payable to the Department of Revenue.

(f) The proceeds from the issuance of the identification marker fees collected shall accrue to the credit of, and be deposited in, the Public Road and Bridge Fund.

(g) It shall be a violation of this article for a motor carrier to operate or cause to be operated in this state any motor vehicle as defined herein unless the motor vehicle displays the required identification marker in the manner designated by the commissioner; provided, that the commissioner by regulation may exempt from the requirement for displaying the identification marker such motor vehicles as urban and public transit motor vehicles or others if in his discretion they are clearly identifiable and the effective enforcement of this article will not suffer thereby.

(h) In addition, the Commissioner of Revenue may authorize the operation of a motor vehicle without the identification marker required by issuing a trip permit, valid for not exceeding seven days, for a fee to be set by regulation based on administrative costs of administering the agreements pursuant to Article 9 of Chapter 17 of this title payable in advance. Trip permits are to be obtained by motor carriers having only occasional or infrequent trips into and through the state. To be valid a trip permit must be supported by a valid invoice of current date showing that sufficient tax-paid fuel was purchased in the state to propel the vehicle for the number of miles it traveled over the highways of the state.

(i) In order for the department to have sufficient time in which to prepare the identification markers for transmittal to the motor carrier, every motor carrier subject to this article shall, between the dates of October 1

and November 15 of each year, furnish to the Department of Revenue an application, listing all motor vehicles operated by the motor carrier and for which an identification marker is required, giving for each vehicle the make, serial number, and type fuel used. The application shall be accompanied by a remittance in an amount sufficient to cover the fee or fees herein provided for.

(j) Motor carriers acquiring additional motor vehicles after the date of November 15 of each year must obtain an identification marker for each motor vehicle before operating the motor vehicle over the street and highways of this state. (Acts 1961, No. 674, p. 925, § 11; Acts 1965, No. 750, p. 1357, § 6; Acts 1971, No. 1408, p. 2403; Acts 1992, 2nd Ex. Sess., No. 92-710, p. 205, § 2; Acts 1994, No. 94-586, p. 1078, § 7.)